all cases lead to a consideration of the interests of all persons involved. Before the transaction, whether it be furnishing supplies to, or a tort committed by the ship, the owner has, as one of that compound of rights *in personam* constituting a right *in rem*, a right that the present plaintiff shall not touch the ship. After the transaction, the situation may be reversed and the plaintiff given the right *in rem*, including a right that the owner himself shall not touch the ship until the plaintiff's claim be satisfied from it. Whether the transaction should produce this shifting of rights is ultimately a question of political and economic policy.[18] The interests of all parties must be considered and regulated in view of the peculiar circumstances of maritime affairs. The courts of the United States, it is submitted, should follow the English courts and develop on such bases reasoned principles of decision, rather than gloss over the real difficulties involved by the application of a chimerical rule based on an historical misconception.

VALIDITY OF A LABOR UNION BY-LAW INVOLVING EXPULSION FOR PETITIONING THE LEGISLATURE. —The long struggle of labor unions for a place in our legal scheme of things has been generally successful. No longer is their very existence attacked as a criminal conspiracy or a combination in restraint of trade. They are acknowledged as a desirable, or at least a necessary, feature of modern industry. The chief factor in the winning of such recognition, especially through legislative enactment, has been the force of collective action. A recent Pennsylvania decision,[1] which seriously impairs the unions' power to maintain their external unanimity in spite of internal differences, is therefore especially significant. A by-law of a local union of the Brotherhood of Railroad Trainmen provided that any member using his influence against the union's legislative representative should be expelled.[2] A member signed a petition to the state legislature asking a reconsideration of the Full Crew Law.[3] This action was admitted to come within the by-law and the member was expelled therefor. The court ordered him to be re-

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[18] Support for the American cases may be found in such considerations of economic policy. In contract cases perhaps few would deal with a ship if no lien could be obtained on her and the only right allowed were one against a foreign owner. The tort cases may be supported on the idea of a risk of the business. But these considerations are not conclusive and the arguments for and against it deserve more consideration than has been given them in our courts. An interesting analogy is to be noted in some states where statutes have been passed giving a lien on an automobile causing an injury, even when driven by one other than the owner or his agent. See 1905 LAWS OF TENN., c. 173, § 5; 1912 ACTS OF S. CAR., p. 737.

[1] Spayd *v.* Ringing Rock Lodge, etc., 113 Atl. 70 (Pa. 1921). For a statement of the facts of this case, see RECENT CASES, *infra*, p. 348.

[2] "Any member of the brotherhood using his influence to defeat any action taken by the national legislative representative or any action regularly taken by the legislative representatives in meeting assembled, or of legislative boards under their proper authorities, shall, upon conviction thereof be expelled."

[3] 1911 PA. P. L., 1053; PA. STAT., §§ 18655–18663. See Pennsylvania, etc. Co. *v.* Ewing, 241 Pa. St. 581, 88 Atl. 775 (1913).

instated,[4] on the ground that the by-law was void as a breach of the constitutional guarantee of the right to petition the legislature.[5]

The general power of labor unions to adopt by-laws for internal discipline is unquestioned.[6] Penalties for violations of union rules as to strikes,[7] wages,[8] open shops,[9] and unfair employers,[10] all of which rules are for the purpose of making the union's action unanimous and thereby effective, are imposed continually. The distinguishing point of the Pennsylvania case was that the act there penalized was the exercise of a constitutional privilege.

An agreement not to exercise a constitutional privilege does not deprive the promisor of that privilege,[11] but the law may or may not allow a penalty [12] for breach of the contract.[13] Thus a contract of arbitration, though ineffective to deprive the parties of their legal remedies, may give a right to damages on its breach.[14] So an agreement by a foreign corporation not to remove a suit to a federal court is ineffective for that end, but its license to do business may be revoked if it does so.[15] If, however, it is engaged in interstate commerce it may not be

[4] Reinstatement is the proper remedy if the expulsion was not according to lawful rules of the association. Weiss *v.* Musical, etc. Union, 189 Pa. St. 446, 42 Atl. 118 (1899); Fritz *v.* Knaub, 57 Misc. 405, 103 N. Y. Supp. 1003 (1907), aff'd, 124 App. Div. 915, 108 N. Y. Supp. 1133 (1908).

[5] The court found some Pennsylvania authority to the effect that any unreasonable by-law of a voluntary association may be disregarded by the courts. Lynn *v.* Freemansburg, etc. Ass'n, 117 Pa. St. 1, 11 Atl. 537 (1887); Hibernia, etc. Co. *v.* Comm., 93 Pa. St. 264 (1880). Such a doctrine finds little support in the authorities. See Weatherly *v.* Medical Society, 76 Ala. 567 (1884); Levy *v.* Magnolia Lodge, 110 Cal. 297, 42 Pac. 887 (1895). And in view of the complete lack of predicability under such a rule, sound principle is opposed to it. The court said it might rest the case on this ground alone.

[6] Wabash, etc. Co. *v.* Hannahan, 121 Fed. 563 (E. D. Mo., 1903); Jetton-Dekle Lumber Co. *v.* Mather, 53 Fla. 969, 43 So. 590 (1907). See notes 7–10 *infra*.

[7] Mayer *v.* Journeyman, etc. Ass'n, 47 N. J. Eq. 519, 20 Atl. 492 (1890); Jetton-Dekle Lumber Co. *v.* Mather, *supra*.

[8] Master, etc. Ass'n *v.* Walsh, 2 Daly (N. Y.) 1 (1867); Longshore, etc. Co. *v.* Howell, 26 Ore. 527, 38 Pac. 547 (1894).

[9] Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663 (1903); Mayer *v.* Journeyman, etc. Ass'n, *supra*.

[10] Burns *v.* Bricklayers, etc. Union, 27 Abb. N. C. 20, 14 N. Y. Supp. 361 (1891); Longshore, etc. Co. *v.* Howell, *supra*.

[11] Nashua River Paper Co. *v.* Hammermill Paper Co., 223 Mass. 8, 111 N. E. 678 (1916).

[12] The usual penalty is of course damages. In the principal case expulsion may fairly be said to be an agreed substitute for damages, something in the nature of liquidated damages, if the by-law be construed as a promise not to petition the legislature. See note 15, *infra*.

[13] Similarly waiver of a constitutional right may or may not be allowed. An example is the right to trial by jury, which may be waived in civil cases, Henderson's Distilled Spirits, 14 Wall. (U. S.) 44 (1871); Palmer *v.* Lavers, 218 Mass. 286, 105 N. E. 1000 (1914), but probably not in criminal cases, Hill *v.* People, 16 Mich. 351 (1868); Dickinson *v.* United States, 159 Fed. 801 (1st Circ., 1908).

[14] Call *v.* Hagar, 69 Me. 521 (1879); Pond *v.* Harris, 113 Mass. 114 (1873).

[15] Doyle *v.* Continental Ins. Co., 94 U. S. 535 (1876); Security, etc. Co. *v.* Prewitt, 202 U. S. 246 (1906).

These cases suggest the possibility that, in the principal case, even though a contract to the same effect would be unenforceable, this by-law might be effective as a condition of membership. Since the union can exclude men altogether, may it not admit them on any condition whatever? See Greer *v.* Stoller, 77 Fed. 1 (W. D. Mo., 1896). This argument might hold in case of a purely social association. See Levy *v.*

so penalized, even as to its intra-state business.[16] So the fact that the by-law in the principal case penalized the exercise of a constitutional privilege is not enough by itself to decide the case.[17] The real question in every such case is whether the social interest in the free exercise of the constitutional privilege involved is sufficiently strong to invalidate the agreement which is hampering the exercise of that privilege.

In the principal case there is a clear social interest in the maintenance of efficiently functioning labor unions,[18] an interest increasingly recognized by legislatures[19] and courts.[20] Moreover, there is a strong interest in having unions resort to the legislature for the accomplishment of their purposes rather than to economic warfare. Any decision which impairs the effectiveness of this method of action must therefore be carefully scrutinized. On the other hand lies the great public interest in keeping the legislature informed of and responsive to the popular will. The contact to be established is between the legislature and the actual present will of the individual, not his will as determined for him by a majority vote of a labor union, even though he has so agreed. It is essential to the maintenance of this contact that the exercise of the "right to petition" shall not entail serious penalties to the individual.[21]

There is a further important consideration. This by-law affects the members of the union not only as individuals but also as citizens, and thereby affects the state. Agreements between private persons touching public matters rest on very insecure footing.[22] A contract as to appointment to or exercise of a public office is void as against public policy.[23]

Magnolia Lodge, 110 Cal. 297, 310, 42 Pac. 887, 891 (1895). But the members of a labor union like that in the principal case have a property interest therein which the constitution protects. There is a wide distinction between the governing power of a state, exercised in making foreign corporations agree to "unconstitutional conditions," and that of a labor union. The latter flows wholly from the agreement between the members, so if this by-law is effective in any way it must be because the members agreed that it shall be so. Austin *v.* Searing, 16 N. Y. 112 (1857); Harington *v.* Sendall, [1903] 1 Ch. 921. The difference between holding the by-law a contract and treating it as a condition is only a matter of legal technique. The case depends on whether the by-law is to be given effect according to its tenor, and that depends on the same considerations under either theory.

[16] Western Union *v.* Kansas, 216 U. S. 1 (1910); Pullman Co. *v.* Kansas, 216 U. S. 56 (1910); Herndon *v.* Chicago, etc. Co., 218 U. S. 135 (1910); Harrison *v.* St. Louis, etc. Co., 232 U. S. 318 (1914); Donald *v.* Philadelphia, etc. Co., 241 U. S. 329 (1916).

[17] The court seemed to think so, however. It relied most strongly on general *dicta* from United States *v.* Cruikshank, 92 U. S. 542 (1875), to the effect that an individual cannot deprive another of a constitutional right.

[18] See 34 HARV. L. REV. 880, 884.

[19] See CLAYTON ACT, § 6, 38 STAT. AT L. 731, and TRADE DISPUTES ACT (1906), 6 EDW. 7, c. 47.

[20] Comm. *v.* Hunt, 4 Met. (Mass.) 111 (1842); Tracy *v.* Banker, 170 Mass. 266, 49 N. E. 308 (1898); and cases cited notes 6–10, *supra*.

[21] "The right *unrestrained and unpenalized* by state action on compliance with the forms required by the law of the United States to ask the removal of a cause pending in a State to a United States court *is obviously of the very essence of the right* to remove conferred by the law of the United States." *per* White, C. J., speaking for a unanimous court in Harrison *v.* St. Louis, etc. Co., 232 U. S. 318, 329 (1914).

[22] See 3 WILLISTON, CONTRACTS, §§ 1726–1735.

[23] Sallade *v.* Schuylkill County, 19 Pa. Super. Ct. 191 (1902); Wishek *v.* Hammond, 10 N. D. 72, 84 N. W. 587 (1900); Harris *v.* Chamberlain, 126 Mich. 280, 85 N. W. 728 (1901).

A labor union may not financially support a public official,[24] or control him while in office,[25] because the office is a public trust requiring the untrammeled judgment of the incumbent. Such a judgment is desired from every voter, since all, for the purpose of voting, are public officials. Consequently an agreement to vote in a certain way is clearly unenforceable.[26] A by-law of a labor union providing that any member not voting as directed should be expelled would be equally invalid.[27] Yet this is but one step logically beyond the principal case and rests on the same kind of considerations. On the whole, the result in the principal case seems satisfactory. But the question is a very nice one, and a slight variation in the facts might well lead to the opposite result.

LIABILITY OF A STATE ENGAGED IN COMMERCIAL ENTERPRISES. — In view of the present tendencies toward governmental ownership and administration of commericial industries, apparent in some of our western states,[1] the question is becoming increasingly important, whether the state, in controversies arising from such enterprises, may be sued without its consent. In a recent case[2] in which a depositor of the Bank of North Dakota sought to garnish credits of the bank, the Supreme Court of North Dakota answered this question in the affirmative. It is submitted that the decision is unsound.

It has not been at all uncommon for states to be interested in commercial enterprises through stock ownership in corporations. Chief Justice Marshall's *dictum* in *Bank of the United States* v. *Planters' Bank*,[3] to the effect that a government which becomes a partner in a trading company takes for that purpose the character of a private citizen, was in reality directed toward the corporate situation only.[4] There applied, it is, of course, sound. A legal entity has been created which, by the terms of its creation, may sue and be sued.[5] Whether the state owns little or all of the stock is immaterial.[6] A different situation is presented, however, when the industry is owned by the state and operated in its name by an adminstrative body.[7] No corporate interme-

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[24] Osborne *v.* Amalgamated Society, [1909] 1 Ch. 163; Amalgamated Society *v.* Osborne, [1910] A. C. 87.

[25] Schneider *v.* Local Union, 116 La. 270, 40 So. 700 (1905). See Amalgamated Society *v.* Osborne, [1910] A. C. 87, 99, 111.

[26] See 3 WILLISTON, CONTRACTS, § 1732.

[27] See Osborne *v.* Amalgamated Society, [1909] 1 Ch. 163, 193.

[1] See Andrew A. Bruce, "State Socialism and the School Land Grants," 33 HARV. L. REV. 401.

[2] Sargent County *v.* State, Doing Business as Bank of North Dakota, 182 N. W. 270 (N. D., 1921). For the facts of this case see RECENT CASES, *infra*, p. 346.

[3] 9 Wheat. (U. S.) 904, 907 (1824).

[4] See 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 3 ed., 519.

[5] An illustration of this is presented by the Emergency Fleet Corporation. In the Matter of Eastern Shore Shipbuilding Corporation, Bankrupt (Emergency Fleet Corporation *v.* Wood), 54 Chi. L. N. 58 (2d. Circ., 1921).

[6] Darrington *v.* Bank of Alabama, 13 How. (U. S.) 12 (1851). The state of Alabama was the only stockholder of the bank.

[7] That is the method employed in North Dakota. See 1919 LAWS OF NORTH DAKOTA, c. 151.